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No. 84-313

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ELEANOR S. SIMPSON
Petitioner

v.

DONALD M. SIMPSON
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

I. (As stated by Petitioner) WHETHER OR NOT THE LOWER COURT ERRED IN ITS FINAL JUDGMENT BY DENYING APPELLANT'S REQUEST FOR SPECIAL EQUITY, REHABILITATIVE ALIMONY, AND IN ITS DETERMINATION TO DIVIDE ASSETS OF THE MARRIAGE AS DIVIDED BY THE FINAL JUDGMENT.

II. (By Respondent - Objection to jurisdiction pursuant to Supreme Court Rule 22.3) WHETHER THIS COURT IS WITHOUT JURISDICTION FOR REASONS THAT: (a) THE QUESTION SOUGHT TO BE PRESENTED WAS NOT PRESENTED ADEQUATELY OR IN A TIMELY MANNER BELOW. (b) THE JUDGMENT BELOW RESTS ON ADEQUATE NON-FEDERAL BASIS. (c) NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

OPINIONS BELOW

The final judgment and appellate decisions are quoted in the appendix to the Petition.

STATEMENT OF THE CASE

The Respondent accepts in large part the statement of the case of the Petitioner. However, Respondent would like to add that as a retired Army Colonel, being age sixty-seven (67) at the time of trial (trial transcript, Volume I, page 33, line 14), he was entitled to receive gross retirement pay in the amount of One Thousand Nine Hundred Fifty-One and No/100 Dollars ($1,951.00) per month until his death (trial transcript, Volume I, page 34, lines 2-4). After deductions, including life insurance, federal withholding and

survivor benefits for the Petitioner, the Respondent was entitled to receive net retirement pay of One Thousand Four Hundred Twenty-One and 31/100 Dollars ($1,421.31) per month for as long as he lived (trial transcript, Volume I, page 176, lines 9-12). While there was testimony placing an actuarial value upon the Respondent's right to receive this retirement pay during his lifetime, the same actuary admitted and agreed that actuarial value had no real value inasmuch as the actuarial value could not be negotiated for cash and the only right to the Respondent was to receive the monthly income during his lifetime (trial transcript, Volume III, page 513, lines 8-24). Furthermore, said retirement pay and any actuarial value attached or associated with it cannot be used as security for a loan or mortgage, cannot

be cashed in, cannot be utilized to obtain advances or for any use other than the receipt of monthly payments (trial transcript, Volume III, page 543, lines 12 - 25, and page 544, lines 1-3).

JURISDICTION

THE FEDERAL QUESTION WAS NOT RAISED AND WAS NOT PASSED ON BELOW

The Amended Petition For Dissolution of Marriage sought alimony and equitable distribution of property. In preparation for trial in accordance with pre-trial orders of the court, the Petitioner filed a pre-trial compliance which set forth the issues of fact and law to be determined by the court. See excerpts of Wife's Pre-trial Compliance, pp. A-1 - A-4 of Appendix hereto.

Then the Wife furnished to the trial court a Memorandum of Law specifically pertaining to the question of the husband's military retirement pay. That Memorandum argued for equitable distribution of the retirement pay as property of the parties, but it specifically recognized Florida cases which show that Florida courts can take

into consideration a husband's military retirement pay when awarding alimony to a wife. The overall tenor of the argument appears to be that the law permitted alternative disposition. The pertinent portion of the Wife's Memorandum is included herein at Appendix pp. A-5 - A-11. Particularly see A-8.

The Wife stated two issues on appeal to the Fifth District Court of Appeal of Florida. Appendix hereto p. A-12. The entire appellate argument of the Wife on Issue I is included herein in Appendix pp. A-13 - A-29.

The Petitioner's argument now, summarized, appears to be that USFSPA [10 U.S.C. §1408(c)(1)], by permitting a state court to consider military retirement pay either as property solely of a retired member or as community of the retired member and his spouse,

pursuant to law of the particular state, preempted the consideration of such retirement pay as anything other than divisible property. The pleadings, pretrial compliance issues, pre-trial memorandum, and the appellate brief are utterly devoid of this preemption argument. Although arguments were made seeking equitable distribution of the husband's retirement pay as property, they were directed to the discretion of the court in proceedings which also sought the award of alimony.

The wife's comments during trial, quoted in her own Petition, regarding her need for income and her wish to have income comparable to the Respondent's, sound in the nature of pleas for alimony rather than division of property, in accordance with her prayers for relief contained within her Amended Petition for

Dissolution of Marriage. These hardly constitute the raising of the federal question as contended by Petitioner.

The Circuit Court did not, nor was ever it asked to, pass on any federal question of preemption. Rather, the Circuit Court properly interpreted the USFSPA and considered whether or not to award the Petitioner the benefits awarded her as property or alimony, and in its discretion determined to award alimony as sought within the Petitioner's alternative prayers for relief.

With regard to her first appellate point, Petitioner focused her argument upon marital misconduct and adultery rather than upon a division of property versus alimony as is now contended. No federal questions were raised or preserved.

On Motion for Rehearing the issue of military retired pay as an award of property was first discussed on appeal as an alternative to an award associated with alimony. The Petitioner, quoted USFSPA and argued for property disposition but did not argue that it was mandatory. Never has it been contended until now that USFSPA has required sole treatment of retirement pay as divisible property and preempted its use as the measure of any other state purpose.

The pertinent part of Wife's Motion for Rehearing is in Appendix A-30 - A-33. The specific question simply was not clearly raised even on motion for rehearing. However, under Florida appellate procedure, questions cannot be raised for the first time on a motion for rehearing. Cartee v. Florida Dept. of H & R Services, 354 So.2d 81,83 (Fla. 1st

DCA 1978). Questions presented to a state court for the first time on a petition for rehearing also are too late for consideration by this court unless the state court exercises its jurisdiction in such a way that the case could have been brought here had the question been raised prior to original disposition. See Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945); Hanson v. Denckla, 357 U.S. 235 (1958); Beck v. Washington, 369 U.S. 541 (1962). See concurring opinion in Estate of Wilson v. Aiken Industries, Inc., 439 U.S. 877 (1978).

Further,the decision below plainly is founded on an adequate state ground, as will appear more fully from the next section of argument in this brief.

REASONS FOR NOT GRANTING THE WRIT

The first basic reason for not granting the writ was stated in the preceding argument, that federal question jurisdiction was not properly or adequately made or preserved.

Secondly, the award by the trial court is not in conflict with the express language of USFSPA and is founded on adequate state grounds. The relevant section cited by the Petitioner herself when singled out from the entire USFSPA states:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981 either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. (Emphasis added.) 10 U.S.C. §1408(c)(1).

Florida is not a community property

state. The Act, USFSPA, is permissive in allowing state jurisdictions to treat retired military pay as community property or not. Not one word of the statute says that a common law state may not utilize retired military pay as a measure of alimony. In Florida, trial judges are possessed with broad discretionary authority to do equity between the parties in a dissolution case, and to utilize various remedies to accomplish the purposes, including lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support money, special equities, equitable distribution, and award of exclusive possession of property. See Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980); and Duncan v. Duncan 379 So.2d 979 (Fla. 1980). Examination of the final judgment sought to be reviewed shows that is

exactly what the court did in this case in making an equitable distribution of properties the parties owned and in awarding one-half of the husband's disposable military retirement pay as alimony.

Thus it is seen that the judgment sought to be reviewed did not "characterize" the husband's pension benefits as alimony, but apparently considered the retirement benefits to be the property of the husband and awarded one-half of the disposable funds as alimony. In this regard, the question presented, as argued by the Petitioner, misrepresents what was done by the final judgment.

Additionally, the claim of the Petitioner that designation as alimony makes it taxable to her is misleading. The retirement pay income stream is

taxable. Respondent would submit that a division of these monies if paid directly to her as a property right would also be attributable income to her and taxable as income, and the tax consequences to her of its characterization are nil and irrelevant.

Florida courts did not abuse or determine any federal laws or constitutional issues. The trial court did not violate the congressional characterization in the USFSPA of military retired pay as property, because the act leaves open the way to treat the pay as property of the husband, but subject to awards of alimony. The trial court did not violate federal law for there was no such federal law to violate in that the federal law was permissive rather than directive. The trial court did not deprive Petitioner of benefits

which she was entitled to under the USFSPA, but awarded her substantial benefits as alimony from the retirement pay.

An income stream of retirement pay is, of course, property. If it is community property, as in 8 states, the disposition of the property substantially may be a matter of law upon dissolution of marriage. Where it is not community property, as in 42 states, then the equitable concepts of the courts of those states, and judicial discretion, may have significant effect upon the disposition of the income stream upon dissolution, whether by way of alimony or equitable distribution or whatever. The Congress did not purport to direct the states how to dispose of such property upon dissolution but clearly intended that the states might apply their own laws. The

effect of Petitioner's argument is, to some extent, to try to impose community property concepts on the 42 non-community property states.

The case of Hartzell v. Hartzell, 434 So.2d 353 (Fla. 4th DCA 1983) specifically recognized that entitlement to military retirement pay is an appropriate factor to be considered in making an award of alimony in this state. See also Mills v. Mills, 417 So.2d 298 (Fla. 1st DCA 1982); Cullen v. Cullen, 413 So.2d 1196 (Fla. 1st DCA 1982); O'Neal v. O'Neal, 410 So.2d 1369 (Fla. 5th DCA 1982); Higgins v. Higgins, 408 So.2d 731 (Fla. 1st DCA), pet. for rev. denied, 417 So.2d 329 (Fla. 1982) and Bradley v. Bradley, 385 So.2d 101 (Fla. 5th DCA 1980).

The case of Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) does not help Petitioner. Petitioner overlooks the

purposes expressed by Congress in the statutes and the direction in which congress was headed in each instance. In Hisquierdo, the statute precluded railroad retirement benefits from being considered as community property under California law, but the statute did have a provision permitting such payments to be reached as alimony. Alimony was defined by the Congress in its common law terms. To avoid such limitations, and this court's case of McCarty v. McCarty, 453 U.S. 210 (1981), the Congress has said, permissively, that military retirement funds may be considered as community property where state laws so provide, or sole property in common law jurisdictions. Nothing in the statute says that common law states can't consider the property and award up to 50% of the disposable benefits as alimony.

The purpose of the statute was to open the doors to the broad equitable powers of the state courts in providing for alimony, support, and property distribution in accordance with the laws of the various states, without restriction thereon through theories of preemption. The purpose of Congress in USFSPA was to leave the whole subject of domestic relations to the states, as recognized in Hisquierdo and on page 40 of the Petition in this cause.

In Florida, it seems clear that the wife would not be deemed to have a special equity in the husband's military retirement pay. See Canakaris and Duncan, supra. This would militate against equitable distribution of retirement funds as property, but not against an award of alimony. The trial court specifically found in the final judgment

sought to be reviewed that there were no findings of special equities between the parties and that there was to be no further adjustment of equities between them. See Petitioner's Appendix, page A-7.

Hisquierdo points out that this court, in family law cases, has limited review to determination whether Congress has required pre-emption of state law by positive, direct enactment. No such requirement is expressed or implied in the permissive language of USFSPA, and such construction is negated impliedly by (10 U.S.C. Sec. 1408 (e) (6) which recognizes liability for payment of alimony.

CONCLUSION

It is respectfully submitted that the writ of certiorari should be denied

because the specific federal question sought to be raised, concerning preemption, was neither properly nor adequately preserved, nor preserved in a timely manner; and because the judgment for alimony is adequately founded in state law; and because the federal statute in question, USFSPA, does not require preemption of state law anyway, but was intended to authorize the applicability of different state laws in the various jurisdictions.

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APPENDIX

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EXCERPTS FROM WIFE'S PRE-TRIAL COMPLIANCE

Comes now the Wife, ELEANOR S. SIMPSON, by and through her undersigned legal counsel, pursuant to the order setting non-jury trial entered by this Court on June 21, 1982, and files this her pretrial compliance as follows:

1. ISSUES OF FACT AND ISSUES OF LAW TO BE TRIED

(a) Whether the marriage is irretrievably broken.

(b) Whether the Wife should be awarded the marital home together with the furniture and furnishings located therein more specifically set forth in her amended petition for dissolution of marriage as partial lump sum alimony, as a partial equitable distribution of the parties' estate or as a result of her special equity claim.

(c) Whether the Wife should be

awarded the 1980 Cadillac automobile as partial lump sum alimony, as a partial equitable distribution of the parties' estate or as a result of her special equity claim.

(d) Whether the Husband should be required to provide permanent, periodic alimony to the Wife.

(e) Whether the Husband should be required to provide the Wife with medical, hospitalization, doctor and dental insurance as additional permanent alimony.

(f) Whether the Husband should be required to provide the Wife with life insurance on his life with the Wife as owner of any said policies of insurance as additional permanent alimony.

(g) Whether the Wife should be awarded an interest in the Husband's military retirement and/or pension

benefits as a partial equitable distribution of the parties' estate.

(h) Whether the Wife should be awarded an interest in the Husband's retirement and/or pension benefits he receives from Martin Marietta Company as a partial equitable distribution of the parties' estate.

(i) Whether the Husband should be required to reimburse the Wife for funds he expended for the use and benefit of Donna Jackson.

(j) Whether the Husband should be required to reimburse the Wife to adjust the equities between the parties in regard to their 1981 tax liabilities.

(k) What distribution should be made of the remaining estate of the parties.

(l) Whether the Husband should be required to contribute toward the Wife's attorneys' fees and suit monies.

(m) Whether the Court should withold entering a final judgment of dissolution of marriage until after February 9, 1983, in order to allow the Wife to obtain her military benefits as provided to her by recent Federal legislation.

EXCERPT FROM WIFE'S TRIAL MEMORANDUM OF LAW REGARDING FEDERAL MILITARY RETIREMENT PAY AND SURVIVOR BENEFIT PLAN

COMES NOW the Wife, ELEANOR S. SIMPSON, by her undersigned counsel, and submits herewith Memorandum of Law concerning Husband's military retirement pay and Survivor Benefit Plan benefits.

Public Law 97-252, passed September 8, 1982, and enrolled as 96 U.S. Statutes 730 and codified in 10 U.S. Code Sections 1401 through 1451 are entitled "Uniform Services Former Spouses' Protection Act." The Committee on Armed Services considered Senate Bill 1814 to amend Title X, United States Code to require the secretary concerned to comply with the terms of certain court orders in connection with the divorce, dissolution, annulment or legal separation of a member or former member of the Uniform Service and which affect

the retired or retainer pay of such a member or former member, and for other purposes. The Senate Bill 1814 was favorably reported and was passed as cited above. The Committee Report No. 97-502, Senate, 97th Congress, Second Session, stated the purpose of the bill:

> "The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in McCarty v. McCarty, 453 U.S. 210 (1981). The bill would accomplish this objective by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation."

A copy of this Committee report is attached hereto.

In the case of Cullen v. Cullen, 413 So.2d 1196 (Fla.,1st D.C.A. 1982), the

First District Court of Appeals upheld the trial court judge in his ruling that a wife was entitled to an amount equal to one-half of her husband's net retirement pay from military service after a 22-year marriage. The appellate court considered husband's argument made pursuant to the decision of the Supreme Court in McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed. 2d 589 (1981). The Cullen court concluded that McCarty did not prevent a state court from awarding a percentage of husband's military retirement pay entitlement as alimony. The court did not disturb the judgment's award of permanent periodic alimony in an amount equivalent to one-half of the net retirement pay because the marriage was of 22 years duration during which time the husband had been in military service.

The point Wife makes with regard to

Public Law 97-252 is that it specifically overrules the holding of the Supreme Court in McCarty. It amended 10 U.S. Code Section 1408 by providing that a court of competent jurisdiction may enter an order of final decree of dissolution of marriage, issued in accordance with the laws of the jurisdiction of that court, which may provide for payment of alimony or a division of property and may specifically provide for the payment of an amount expressed in dollars or as a percentage of disposable retired pay from the disposable retired pay of member to the spouse of the military member upon dissolution of marriage. It defines disposable retired pay as the total monthly retired pay to which a member is entitled less various listed items including federal, state and local income taxes and the cost of elected annuities under the Survivor Benefit Plan

provided for in Chapter 73 of Title X. These payments to wife may be ordered by the court as a division of property rather than as alimony, but the payments may not exceed 50% of the net disposable retired pay.

The point Wife wishes to make by the foregoing is that this court should consider the military retirement pay entitlement to be an item of property subject to equitable distribution. The court should consider the length of services the Wife performed to the Husband while in pursuance of his military career: this is a marriage of 43 years duration, during which time the Husband served in the military service for over 20 years. The federal law provides for direct payment to Wife and the court should consider the fact that the Public Law 97-252 was passed after the decision in the Cullen case, and

provide for equitable distribution rather than alimony.

The Act further provides for cost of living adjustments. The court should consider awarding to Wife 50% of all cost-of-living adjustment increases which inure to the benefit of the Husband due of his military pay entitlement. In the case of Mills v. Mills, 417 So.2d 298 (1st D.C.A. 1982), the First District Court of Appeal upheld the trial court's award to a former military spouse of an automatic increase in alimony in an amount equal to one-half of the gross of any increase received by the husband in military retirement income. The appellate court observed that the increases were based on a cost-of-living index. The court concluded that such an award is actually designed to maintain the status quo, not to provide for modification based on changed

circumstances. The court cited 10 U.S. Code Section 1401(a) which is one of the subjects of Public Law 97-252. Therefore, the Wife would ask the court, again, to note that this opinion in Mills was rendered prior to passage of Public Law 97-252 and would ask the court to distribute to her a 50% interest in the gross cost-of-living increases to which the Husband may become entitled.

A Florida trial court has never been prohibited from considering military pensions in support proceedings connected with dissolution of marriage. Higgins v. Higgins, 408 So.2d 731 (1st D.C.A. 1982).

EXCERPTS FROM WIFE'S BRIEF ON APPEAL TO

FLORIDA FIFTH DISTRICT COURT OF APPEAL

ISSUES

I] WHETHER OR NOT THE LOWER COURT ERRED IN ITS FINAL JUDGMENT BY DENYING APPELLANT'S REQUEST FOR SPECIAL EQUITY, REHABILITATIVE ALIMONY, AND IN ITS DETERMINATION TO DIVIDE ASSETS OF THE MARRIAGE AS DIVIDED BY THE FINAL JUDGMENT.

II] WHETHER OR NOT THE LOWER COURT ERRED IN ITS FINAL JUDGMENT BY DENYING APPELLANT'S REQUEST FOR ATTORNEY'S FEES AND COSTS.

ARGUMENT

ISSUE I

WHETHER OR NOT THE LOWER COURT ERRED IN ITS FINAL JUDGMENT BY DENYING APPELLANT'S REQUEST FOR SPECIAL EQUITY, REHABILITATIVE ALIMONY, AND IN ITS DETERMINATION TO DIVIDE ASSETS OF THE MARRIAGE AS DIVIDED BY THE FINAL JUDGMENT.

In the Amended Petition For Dissolution of Marriage, (A-1), and in Final Hearing, Appellant requested:

The marital home and contents;

Equal insurance benefits;

Alimony;

Equitable division of liquid assets;

Equal income;

One of the two automobiles;

Reimbursement of depleted assets;

Attorneys fees;

Reservation of jurisdiction for

future adjustments due to Federal Legislation.

The Final Judgment ordered the home sold and the contents divided equally, provided no insurance equalization; did not provide equal income, and denied attorneys fees and costs. She did receive one of the two automobiles used in her business, and reimbursement of some depleted assets. She also received 1/2 of the net disposable pay (after deductions) of the military pension as alimony. The Lower Court specifically denied any special equity or rehabilitative alimony and did not reserve jurisdiction. In essence, we feel the Lower Court should have additionally awarded the Wife the home and contents as rehabilitative alimony, equal insurance benefits, assets equal to

his pension plans, and attorneys fees and costs.

In other words, she was short changed.

While we understand the reluctance of a Court to look deeply into the issue of fault and the cause of a marital breakup, this case is one of those that begs for investigation.

Prior to August, 1981, Mrs. Simpson had a comfortable and well established life. She lived in a large waterfront home in a good neighborhood in Orlando, Florida. She had a husband of 42 years and a real estate practice bringing in $50,000.00 per year. Her husband was retired and was receiving approximately $36,000.00 a year from pensions and social security. In addition, their stocks, bonds, and investments produced several thousand dollars a year. She and

her husband had insurance benefits to cover every emergency and she was moving into the Golden Years of her life, secure and relatively happy. In the event her husband were to tragically die, the military pension was secure because of her survivor benefits she and he had paid for over ten years.

Then Mr. Simpson, while driving, discovered a young female hitchiker who turned out to be 26 years old, a drug addict, a prostitute, and married. Who knows what was in the mind of this 68 year old self admitted impotent male? There can be no question, however, that his decision to "pick her up" eventually shattered Mrs. Simpson's Golden Years to ashes.

Now she has to sell her home and move when she doesn't want to move and needs the home because of her business,

(T3-465, 466, 467). The assets acquired during 42 years are to be hauled out the door and eventually given to God knows who. Her stocks and bonds are gone, mortgaged, sold, and depleted. She has no survivor benefits if her ex-husband dies, (T1-180, L2-10; 181, L18-25; T2-211, L1-11),she has no listings in her real estate business and is 64 years old. The Golden Years more closely resemble rusting iron. She has borrowed money from friends and relatives to keep her head above water and now must sell everything to pay off debts.

What about the Husband? He still has approximately $3,000.00 a month in pensions, less $700.00 to Mrs. Simpson, for which he can claim income tax credits. She is paying 1/2 of his withholding taxes. He has a new well paying job, enough assets to buy

the marital home at a forced sale, all insurance benefits he needs and a 26 year old "very close friend". The Court has ordered him to pay $20,000.00 (1/2 of $40,000.00 mis-spent), and as of this writing, he has not yet paid it. Mrs. Simpson needs it to pay a psychiatrist while desparately trying to keep out of a mental hospital.

Adultry (sic) and Marital Misconduct are factors the Lower Court seems to have largely ignored in its award of assets.

Florida Statutes §61.08 (1) specifically provides that adultry (sic) may be considered in determining the amount of alimony. Here, the Court awarded Appellant 1/2 of the net disposable pension plan that was earned during the marriage and it should, if awarded to her, be awarded as a division of property. Alimony should come from

his half - - - not her half. We would have preferred an adjustment of assets per the unopposed expert testimony of Ronald Hirsch, (T3- 496 et seq). He was retained to determine the actual dollar value of the military pension and the Martin Marietta Pension. His valuations in dollars to Mr. Simpson were $235,273 and $48,013, respectively, (T3-510, L18-20; 511, L1-3). If Mr. Simpson dies, the value to Mrs. Simpson is 0. Her support ceases.

McCelland v. McCelland, 318 So.2d, 160 (Fla. 1st D.C.A., 1975), held that even in the absence of a wife's adultry (sic), the persistent adultry (sic) of a husband, even if he seeks no alimony, and even if he doesn't deny the marriage is irretrievably broken, is a relevant factor in awarding assets.

McCosky v. McCosky, 359 So.2d, 494,

(Fla. 4th D.C.A., 1978), clearly discussed a Husband's financial ability in supporting a wife and "harem". They ruled that a husband's post separation adultry (sic) may be relevant as to his economic ability to pay alimony. In that case, the Appellant Court noted that the husband was rich as "Croesus". While Appellee may not quite be so rich, a close analysis of his spending makes Croesus seem like a proverbial church mouse, (Tl- 314, and numerous pages thereafter where checks showing cash in April spent was over $7,000.00, and all credit purchases for cash or charges on Donna Jackson, the "very good friend" of Mr. Simpson, was another several thousand in one month, - - - see also Tl-83, and numerous pages thereafter). In any event, if this man can spend this amount of money that quickly, he could afford

alimony out of his 1/2 of the income.

A Judge can also consider the wife has been dutiful as a true helpmate in the marriage. Oliver v. Oliver, 485 So. 2d, 638 (Fla. 4th D.C.A., 1981), and see his own statements that she "performed admirably as a housewife and mother - - - as good or better than anyone in the community. She also did very well as a military wife, and was "commended" several times, (T1-72,L 16 et seq); T1-73, L6 et seq). The Oliver case specifically suggested factors to be considered in order to "do equity and justice between the parties". The Lower Court respectfully missed something in the case at bar. The Oliver case said:

> ".... if the Court limits itself solely to the economics of the matter, it deprives itself of valuable factors that may aid in doing justice to to the problem."

Appellate Courts are recently, recognizing and discussing the "cause" of marital breakups in awarding assets. In Martin v. Martin, 366 So.2d, 475, (Fla. 3rd D.C.A., 1979), the Court stated that while the amount awarded to the Wife was claimed to be grossly inadequate, her own misconduct involving a married man was directly and causedly related to the marriage breakup. The Lower Court had reduced her award because of an affair with a married man. If a Court can reduce an award because of an affair with a married partner, shouldn't it increase an award in reverse situations?

In Smith v. Smith, 378 So. 2d, 11, (Fla. 3rd D.C.A., 1979), the Court clearly pointed out the husband's adultry (sic) was the cause of the marital breakup and compensated the wife accordingly.

Pitts v. Pitts, 412 So.2d, 404, (Fla. 3rd D.C.A., 1982), said:

> "Even though there is no financial problem, it might well be thought improper to permit an errant spouse to destroy a marriage and then claim benefits equal to those which would have been provided had it remained in tact."

In the case at bar, we have an errant spouse destroying a marriage and getting more than equal benefits from the Lower Court. In Williamson v. Williamson, 367 So.2d, 1016, (Fla. 1979), the Wife was willing to try and save the marriage in spite of the Husband's misconduct. The Husband was not. The Trial Court partially based its award of alimony on those facts. In our case the Husband only wanted to reconcile to get more money from the Wife, but did not want to give up his "plaything", (T2-235,

L2-23; 236, L3-15; 301, L3-10; T2-256, L9-20).

When asked if it was his intent to continue his relationship with Donna Jackson, his response was "absolutely", (T2-293, L3-23).

Vanderslice v. Vanderslice, 396 So.2d, 1185, (Fla. 4th D.C.A., 1981), discussed the husband's failure to his wife's financial obligations during their separation as an important factor. Here we have no support, no checking account, a cutting of insurance benefits and it took a Court Order to make him pay 6 months mortgage payments. After that period she made all payments.

There can be little doubt that Appellant's earning capacity has been greatly diminished, (see associate Mary Ann Bouldino's testimony,T3-411, and Dr.

Golwyn's testimony, T3-367, and pages thereafter.

In Barrett v. Barrett, 305 So.2d, 260, (Fla. 3rd D.C.A., 1974), the husband shot the wife resulting in physical disability which reduced her earning capacity. There she was awarded the marital home as lump sum rehabilitative alimony. In our case, Mrs. Simpson has repeatedly been shot through the heart. How much can a 63 year old heart take before it breaks or withers to the point of giving up? She has been hurt as much as if a bullet lodged in or passed through her. Her earning capacity is reduced and the Lower Court orders her to sell her house, move somewhere else, give up her beds, furniture, and collections to her ex-husband so he can furnish a new house for this 26 year old "close

friend". It is amazing that she has held up at all.

In Hill v. Hill, 415 So.2d, 20, (Fla. 1982), the Supreme Court noted that a Trial Court had authority to compensate a spouse for injury, disfigurement, or loss of earning capacity caused by her spouse. It particularly noted, "equity and justice" and that the Trial Court "may consider any factor necessary," Emp Supp.

Hartley v. Hartley, 399 So.2d, 1126, (Fla. 4th D.C.A., 1981) provided lump sum alimony because of the husband's violent tendencies and in Bird v. Bird, 385 So.2d, 1090, (Fla. 4th D.C.A. 1980), the Court gave lump sum to terminate all relationships. See testimony of Appellee's violence, (T3-435, L19-24; 440, L23-25; 441, L1-25), and his bad temper, T3-471, L17- 25). What better

case to terminate all relationships than the one at bar. Permanent periodic alimony awarded here on 50% of disposable net pay is subject to adjustment each year because of his income tax refunds and future benefits for other people being deducted from her portion without control.

In Brown v. Brown, 300 So. 2d, 719, (Fla. 1st D.C.A., 1979), the Court said:

> "The primary factual circumstance is each spouse's contribution to the marital partnership. In the case subjudice, the wife has been shortchanged."

The Fifth District has addressed fault too. In Thompson v. Thompson, (no relation to this writer), 400 So.2d, 1220, (Fla. 5th D.C.A. 1981), this Court

clearly approved a meager award to a wife based in part upon her conduct. A Court can approve a meager award because of fault, does it not logically follow it could increase a meager award because of fault or conduct.

In Vanderslice, cited previously, the Court awarded virtually all of the assets to the Wife because of fault. In Tommaney v. Tommaney, 405 So.2d, 454, (Fla. 2nd D.C.A. 1981), the Court found the wife had made extraordinary contributions to the marriage and awarded her virtually all of the assets. The award could not be justified because of his ability to pay because the award left his economic status seriously jeapordized (sic).

Time after time Courts have punished women for their marital misconduct. Isn't it time that a good woman, a decent

mother and hard working professional is compensated? Isn't it time that an adulturous (sic), lying, vicious, manipulator pay the price for his misconduct?

EXCERPT FROM PETITIONER'S

MOTION FOR REHEARING

Appellant files this her motion for rehearing of the above cause and shows unto the Court as follows:

POINT ONE

Military Retired Pay as Equitable Distribution

Public Law 97-252, Title X--Former Spouses' Protection Act (now U.S.C. §§ 1401 et seq.) was passed by Congress on September 8, 1982, and became effective February 1, 1983. There is no question but that Federal law overrides State law and renders obsolete state court decisions in conflict with it.

Reference has been made to the Former Spouses' Protection Act in the pleadings in this case, in testimony, in briefs submitted to this honorable Court, and in

oral argument before the court, but no copy of the law has been provided to the Court to guide it in reaching a decision. A copy of P.L. 97-252, Title X is attached to this motion and is the basis for this motion, on the grounds set out below.

The United States Congress in Public Law 97-252, now 10 U.S.C. §§1401 et seq., has specifically stated that military retired pay is "property." Section 1408(c)(1) states:

> ...[A] court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

During Col. Simpson's twenty-four years of military service, Mrs. Simpson was not employed outside the home, but

devoted herself to performance of the duties expected of an officer's wife. Col. Simpson testified (T1-72, L16 et seq.,T1-77 L6 et seq.) that she discharged these obligations in an exemplary fashion. She moved with him from one military station to another, established a home at each location, kept house, entertained, and did all other things necessary to further his military career.

Civilian pension plans have long been viewed as a divisible asset. Now 10 U.S.C. §§1408(c)(1) says that military retired pay can be treated similarly, if there has been at least ten years of marriage during military service. The Simpsons were married forty-three years, twenty-three of which were in the military.

Col. Simpson's military retired pay represents an asset that should be

divided as an equitable distribution and not as alimony. The cost to Mrs. Simpson of calling it alimony is great, as alimony is taxable to her and will terminate should she ever remarry.

Even more important than the name by which this distribution is called is her request that payment to her be made directly from the U.S. Army Paymaster.

For these reasons, appellant urges the Court to reconsider its decision of January 31, 1984, and award to Appellant one-half of Col. Simpson's disposable military retired pay as equitable distribution of a joint asset, to be paid directly to her by the Federal Government, and requests further that division of the retired pay be made before deduction of sums for savings deposits, payment of insurance, or other items that do not benefit Mrs. Simpson.